this defence because it had not been raised in its pleadings.

In my view the defendant, having accepted these bills, engaged to pay them according to the tenor of its acceptance (section 54(a), Bills of Exchange Ordinance) and I would therefore dismiss this appeal.

Finally, it should be mentioned that the defendant firm consisted of three partners. One of the partners, Mr. Tan Chow Soo, "on grounds of commercial morality" did not contest the claim and consented to judgment being entered against him with costs up to date of issue of writ. Only the other two partners, Madam Mahalingam Ratna Ammal and Mr. Mahalingam Ratnavale, contested the claim and in the event they have failed both in the lower court and here. Before us they cited Mr. Tan Chow Soo as second respondent. Mr. C. O. Lim for the second respondent asks for costs of attendance only should this appeal be dismissed; there shall be an order accordingly. The two partners should also pay the taxed costs of this appeal to the plaintiff. The deposit should be paid to the successful respondents towards payment of their taxed costs, in proportion agreed to by them.

Azmi L.P. and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Sharma & Co.; Lim Kean Siew & Co.; Lim, Lim & Oon.*

YEO BENG CHOW v. NEW INDIA ASSURANCE CO. LTD.

[F.C. (Ong C.J. (Malaya) Gill and Ali F.JJ.) July 6, 1970]

[Johore Bahru — Federal Court Civil Appeal No. X. 115 of 1969]

Insurance — Insurance against third party risks — Provision for maintenance of motor vehicle — Contravention — Term to be construed against insurance company — Contra proferentem principle — Road Traffice Ordinance, 1958, s. 80(1).

In this case the appellant had taken out a policy of insurance against third party risks for his motor lorry. The printed form of the policy issued was that used for the comprehensive insurance of commercial vehicles but clause 1 of the policy which referred to insurance against loss or damage "by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear" was deleted. The motor lorry was involved in an accident and damages and costs were awarded against the appellant. The insurance company paid the damages and costs but subsequently sought to recover these amounts from the appellant as damages for an alleged breach by the appellant of condition 3 of the policy. Condition 3 *inter alia* required the motor vehicle to be maintained in an efficient condition. In this case a vehicle's examiner had examined the lorry after the accident and found it to be not roadworthy. The insurance company obtained judgment against the appellant, who thereupon appealed.

Held, allowing the appeal: the conditions in the insurance policy must be construed *contra proferentem* against the insurance company. In this case because of the deletion of condition 1 in the policy, condition 3 had been mutilated and it could not be held that it was binding on the appellant as a condition which he knew or might to have known. In any event it had not been shown that the motor vehicle was not in an efficient condition.

Cases referred to:-

(1) *Jones* v. *Provincial Insurance Co. Ltd.* (1929) 35 Ll.L.R. 135, 136.

(2) *Harbutt's* v. *Wayne Truck Co.* [1970] 2 W.L.R. 198, 209.

(3) *Brown* v. *Zurich Insurance Co.* [1954] 2 Ll. Rep. 243, 246.

(4) *Quinn* v. *Leathem* [1901] A.C. 495, 506.

(5) *Conn* v. *Westminster Motor Insurance Association Ltd.* [1966] 1 Ll. Rep. 407, 414.

FEDERAL COURT.

M. S. Miranda for the appellant.

Thara Singh Sidhu for the respondent.

Cur. Adv. Vult.

Ong C.J.: On July 1, 1960 the appellant, a licensed haulier, took out a policy of insurance against third party risks for his motor-lorry. It was a 5-ton Austin of 1950 vintage which had stood the wear and tear of ten years' service. The printed form of the policy issued was that used for the comprehensive insurance of commercial vehicles. The evidence gives no indication whether third party insurance only was desired by the insured, or whether the insurers, by reason of the age and condition of the vehicle, were not prepared to insure it against loss or damage "by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear". At any rate an indorsement was made on the printed form that "it is hereby understood and agreed that section I of this Policy is deemed to be deleted". Then by a rubber-stamp the word "deleted" was impressed on section I and the exceptions thereto. Paragraph 1(a) of the section is in the terms above quoted.

On January 18, 1961 the appellant's lorry was involved in a collision with a Honda Cub 49 c.c. motorcycle driven by a learner-driver carrying a pillion passenger. The driver died of his injuries. The lorry was examined four days later, on January 22, 1961 by Chow Teik Khoon, a vehicles examiner then attached to the Road Transport Department in Johor Bahru. In his report he described the condition of the vehicle as follows (to quote only the relevant portion): —

"(2) the foot-brake was in order.

(3) the hand brake was not working.

(4) re the steering, the o/s track rod ball joints worn.

(5) re the tyres, both front tyres were bald and both rear 90% (bald).

(6) re the other components (1) front and rear spring shackle pins and bushes worn.

(2) o/s front wheel bearings very slack.

(3) vehicle discharges excessive smoke.

(4) rear floorboards holed.

(7) damage which appeared to have been caused in an accident was o/s front mudguard panel badly dented.

(8) the general condition of the vehicle discounting the effects of accident damage was: Not roadworthy. Items 3, 4, 5 and 6 above refers."

There is not a scrap of evidence that the condition or state of repair of the vehicle had anything to do

with the accident. In this connection it may be observed that condition 4 in the policy requires the insured "as soon as possible" to notify the insurers of any occurrence which may give rise to a claim by third parties. Since no complaint was made by the respondents on this score, it is clear that they had had ample notice to examine the condition of the vehicle — even before the Road Transport Department's examiner, had they seen fit to do so. Whether or not they did so in fact, they made no complaint whatsoever until more than seven months later about the efficiency or state of repair of the lorry. Had they done so promptly and their complaint been disputed, their insured might have been given a proper opportunity of rebuttal. The lorry had been last examined by the Road Transport Department on December 18, 1960 and passed as roadworthy. This was only 31 days before the accident.

An inquest was held by the magistrate in Muar into the death of the motor-cyclist. It was attended by the legal adviser retained by the respondents and evidence was given by the same vehicles examiner of his findings. The proceedings concluded on May 17, 1961. Then followed the prosecution of the appellant's servant, the lorry-driver, for the offence of driving without reasonable consideration for other persons using the road, contrary to section 36(1) of the Road Traffic Ordinance. Pending the trial the respondents gave notice on August 21, 1961 to the appellant which, for the first time, repudiated liability by reason of his failure to maintain the vehicle in an efficient condition, constituting a breach of condition 3 of the policy. The allegation was in general terms which failed to state in what respect they had cause for complaint. Nonetheless the respondents retained an advocate and solicitor to defend the lorry-driver who was acquitted on October 29, 1961.

Action on the third party claim was commenced in the High Court in Muar in 1963. On December 4, 1966 Ali J. (as he then was) gave judgment for the plaintiffs, but holding that the deceased motor-cyclist was guilty of contributory negligence equally with the lorry-driver. The damages awarded amounted to $2,709.60 and costs were taxed at $1,819.35. The respondents were of course liable, by reason of the provisions of section 80(1) of the Road Traffic Ordinance to satisfy this judgment, and they duly paid out the total sum of $4,528.95. They also paid the fees of the advocate and solicitor who on their instructions defended the action. Being thus out of pocket to the extent of $6,551.05 the respondents sought, in Muar High Court civil action No. 95/67, to recover this sum "as damages" by reason of a breach by the appellant of condition 3 of the policy. On November 26, 1969 they succeeded in obtaining judgment as prayed.

Counsel on both sides appeared to have taken too simplistic a view of the issues involved. They agreed that there was only one issue to be tried, namely, whether or not the appellant was in breach of condition 3. It was one of 10 conditions appearing on the back of the printed form. Condition 10 provided that —

"The due observance and fulfilment of the terms of this policy insofar as they relate to anything to be done or not to be done by the insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this policy."

Condition 3 was as follows: —

"The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition and the company shall have at all times free and full access to examine the motor vehicle or any part thereof or any driver or employee of the insured. In the event of any accident or breakdown the motor vehicle shall not be left unattended without proper precautions being taken to prevent further loss or damage and if the vehicle be driven before the necessary repairs are effected any extension of the damage or any further damage to the motor vehicle shall be excluded from the scope of the indemnity covered by this policy."

It had been assumed, as a matter of course, that condition 3 was binding, so much so that the learned trial judge himself had been led to accept the proposition without question. He thought the defects mentioned by the vehicles examiner so obvious that they should have invited immediate attention; in his opinion these defects showed that the vehicle was "not kept in roadworthy condition" and therefore the owner was in breach of condition 3: *quod erat demonstrandum.* Consequently he delivered no written judgment as he considered it supererogatory.

With respect, I think this superficial view of the problems involved does the case less than justice. To assume, without questioning, that condition 3 was necessarily binding was to forget the *contra proferentem* principle in the construction of contracts. As Rowlatt J. said in *Jones* v. *Provincial Insurance Co. Ltd.*[1]: —

"In circumstances of this kind the policy must be construed against the insurance company. It is not a very happy phrase, but what it means is this, that if there is anything the insurance company rely upon to protect them from liability by way of condition precedent they must make it quite clear, and if it is not made quite clear then effect cannot be given to it. On the other hand, if they do make it quite clear, however badly drafted and bad in form it may be, they are entitled to insist upon it."

Condition 3, it will be observed, formed part of the printed form and was intended to apply to the whole of the policy, including section I. The section covers "Loss or Damage" — as its caption clearly indicates — in these terms: —

"1. The company will indemnify the insured against loss of or damage to the motor vehicle and its accessories and spare parts whilst thereon

(a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear."

But section I had been deleted *in toto.* Can it still be true to say that condition 3 was wholly unaffected? Could it survive intact the excision of section I? The first sentence reads: "The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the vehicle in efficient condition . . . " Since the respondents were expressly exempted from all liability to indemnify the appellant against loss or damage, so much of the condition as required the appellant to safeguard the vehicle from loss or damage manifestly could have no application. Neither can the whole of the second sentence in

condition 3 be said to have any relevance for the same reason. Hidden interstitially, however, amid a plethora of words which were plainly irrelevant is the phrase "and to maintain the motor vehicle in efficient condition" — itself an appendage to the obligation imposed on the insured to safeguard it from loss and damage. So far as the respondents are concerned, condition 3 had been mutilated. In its attentuated form only the 9-word phrase remained which might arguably be said to preserve the condition from oblivion. Can it be suggested that this vestigial meaning of condition 3 was still plain to any beholder? To my mind, it certainly was not. The respondents had chosen to use a printed form, in small lettering; the condition was expressed in terminology most appropriate to a comprehensive policy and to that type of policy only. If it needed an argus-eyed reader to see what several trained legal minds had failed to perceive I do not think it can be held that condition 3 was binding on the appellant as a condition which he knew or ought to have known. As Lord Denning M.R. said recently in *Harbutt's* v. *Wayne Tank Co.*[2]: —

"If it is ambiguous, then on all the authorities it does not avail the defendants. They cannot by a printed clause like this, exclude or limit their liability, unless the words are clear and unambiguous."

This, in my view, disposes of the question at issue. What, furthermore, had been overlooked is the natural, ordinary meaning of the word "efficient" in "efficient condition", in relation to the word "roadworthy". Their meaning and connotation seemed to have been regarded as synonymous. The vehicles examiner considered the lorry not roadworthy, for the reasons he gave, but said not a word about it not being efficient. Similarly, the judge thought that, because the lorry was not kept in roadworthy condition, the defendant was in breach of condition 3. *Brown* v. *Zurich Insurance Co.*[3] was referred to as authority for "efficient condition" being held to mean "roadworthy". But I think it is well to remember what Lord Halsbury L.C. said in *Quinn* v. *Leathem*[4]: —

"A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

In *Brown's* case the van was insured under a *comprehensive* policy, subject to conditions as in the instant case. The arbitrator's findings there regarding the tyres were as follows: —

"C. The smooth state of the front tyres which are essential if not integral parts of the vehicle made the vehicle unsafe from the point of view of loss or damage and inefficient in condition.

D. The claimant by neglecting to replace the smooth front tyres with new, retreaded or other tyres with adequate treads had failed to take reasonable steps either to safeguard the van from loss or damage or to maintain it in efficient condition mithin the meaning of general condition 4."

I now quote from the judgment of Sellers J. to show why citation of *Brown's* case as an authority should be received with caution: —

"The question for this court *on those findings* is whether there should be upheld the award which the arbitrator makes that the claimant is not entitled to indemnity under the policy or one of the alternative awards which he makes on the basis that the claimant is entitled to indemnity. In my view, *on those findings of fact, which I cannot disturb in any way,* the conclusion to which the learned arbitrator arrives in the first finding of his award (which he made permanent unless certain steps were taken), that the claimant was not entitled to any indemnity, is the correct one."

That case can have no bearing on the applicability of a condition, though expressed in similar terms, where the insurers here were *not liable for loss or damage* under a policy limited to third party risks.

In *Conn* v. *Westminster Motor Insurance Association Ltd.*[5] cited before us for the first time, it was held that, in the context of condition 5 (worded as condition 3 in this case), the taxi-cab tyres having no tread were unroadworthy and the claimant was not entitled to recover from his insurers for loss of his taxi, even though the accident was not due to the condition of the tyres. Here, again, it may be pointed out that the condition itself had not been whittled down into an unrecognisable form by an indorsement on the policy reducing it to one covering only third party risks. Of condition 5 Salmond L.J. had this to say: —

"I confess that I have considerable sympathy with the plaintiff in this case, first because it is apparent from the evidence that during the nine years preceding the accident he had in general kept his taxi-cab in good condition; secondly, because I do not like conditions precedent in policies of insurance which enable insurers to escape liability for a breach which has absolutely nothing to do with the loss or damage in respect of which the assured seeks to be indemnified. If one thing is plain in this case it is that whatever did cause this accident, it had nothing to do with the dangerous and inefficient condition of the tyres. But I am far from criticizing the insurers, on the particular facts of this case, for having relied on condition 5."

When it is realised what a multitude of claims are constantly being made and settled or tried, arising out of motor accidents, the cases are indeed rare where insurers have opted to rely on a condition such as this to escape liability. I think it can be said with some confidence that, when they do, it is because the insured was at fault — although no evidence of such fault is forthcoming. I have my doubts whether the same can be predicated of the instant case. I incline to this view because I find the respondents had no scruples even about claiming reimbursement of the amount of fee they paid their solicitors. They should have known that the claim was entirely groundless. The duty of insurers to satisfy judgments in respect of third party risks is imposed by statute: see section 80(1) of the Road Traffic Ordinance which reads: —

"If, after a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

The right of recovery, which is the cause of action in this case rests on the following stipulation in the policy: —

"AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.

Nothing in this policy or any endorsement hereon shall affect the right of any person entitled to indemnity under this policy or of any other person to recover an amount under or by virtue of the legislation

But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the legislation."

The legislation referred to is section 80(1). The costs therein referred to plainly do not include solicitor and client costs which the insurers pay their own solicitors. Even had the respondents succeeded in persuading this court to accept their interpretation of condition 3, I fail to see how, *dehors* the terms expressly agreed upon for recovery of payment from an insured, they have any further claim to be indemnified in respect of their own solicitors' costs. At the most judgment should have been given for $4,528.95 only, but, for the reasons stated earlier, the claim fails altogether.

I would allow this appeal with costs both here and in the court below.

Gill and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *M. S. Miranda & Co.; Sault, Keith Sellar & Co.*

SUNGEI BIAK TIN MINES LTD. v. SAW CHOO THENG & ANOR. (No. 2)

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 13, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 81 of 1969]

Practice and Procedure — Judgment of Federal Court — No provision for liberty to apply in perfected judgment — Whether Federal Court functus officio — Power of court to give effect to its judgment or order — Power of court to make such further or other order as the case requires — National Land Code, s. 417 — Courts of Judicature Act, 1964, s. 69(4).

Land Laws — National Land Code, s. 417 — Federal Court's powers under.

In this case the Federal Court had given judgment in which it held that the defendant (appellant herein) had not been guilty of a breach of a mining sub-lease ([1970] 1 M.L.J. 199). Counsel for the appellant thereupon applied for an order that the cancellation of its sub-lease be deleted and that the sub-lease be restored to the register of the land office. The Federal Court made no decision on the application, but told the appellant to make a formal application. In the meantime, i.e. before the appeal was heard by the Federal Court, the respondents had sub-leased the land to one Lee Yat Kai for three years, which sub-lease had been duly registered by the land office. The appellant made a formal application for an order that the Collector of Land Revenue should delete the cancellation of the sub-lease. This application was opposed by the respondents and by Lee Yat Kai.

Held, allowing the application: (1) although the order of the Federal Court had been perfected and no mention was made in it of liberty to apply, such liberty to apply is to be implied;

(2) the Federal Court had power under section 417 of the National Land Code to do all such things as may be necessary to give effect to its judgment or order and under section 69(4) of the Courts of Judicature Act to "make such further or other order as the case requires";

(3) the court therefore could in the exercise of its appellate jurisdiction order the Collector of Land Revenue to delete the registration of the sub-lease in favour of Lee Yat Kai and instead re-register it in the name of the appellant.

Cases referred to:-

(1) *Baker* v. *Turner* [1950] 1 All E.R. 834.

(2) *Tuck Guat Choo* v. *Cheah Ah Hoe & Anor.* [1932] M.L.J. 109.

(3) *In re Suffield and Watts, Ex Parte Brown* [1888] 20 Q.B.D. 693.

(4) *In re St. Nazaire Co.* (1879) 12 Ch. D. 88.

(5) *Fritz & Hobson* (1880) 14 Ch. D. 542.

(6) *Hadjee Daing Petapak* v. *Hadjee Riok* [1932] M.L.J. 149.

FEDERAL COURT.

Lim Kean Chye for the appellant.

J. Puthucheary for the respondents and Lee Yat Kai.

Cur. Adv. Vult.

Suffian F.J. (read by Azmi L.P.): The plaintiffs (now respondents) hold a mining lease from the Perak Government in respect of certain land. They granted a sublease to the defendant company (appellant). The plaintiffs alleged that the defendant had committed a breach of a condition of the sublease by cutting down rubber trees on approximately 60 acres of the mining land and planting tapioca on it without the plaintiffs' permission.

On 17th July, 1969, Chang Min Tat J., agreeing with the plaintiffs, held that the defendant was guilty of breach of condition and ordered that the sublease concerned be cancelled.

The defendant appealed to the Federal Court, which reserved judgment. It delivered judgment on 9th December, 1969, when, allowing the appeal, it held that the defendant had not been guilty of breach of condition. Thereupon counsel for the successful defendant applied for an order that the cancellation of its sublease be deleted, in other words that its sublease be restored to the register of the land office. The court made no decision on the application, but told the defendant to make a formal application.

The defendant now makes this application for an order that the Collector of Land Revenue of Taiping delete the cancellation of its sublease.

The matter is complicated by the appearance of a new sublessee. After judgment in the lower court and before argument of this appeal on 13th November, 1969, the plaintiffs on 20th August granted a sublease to one Mr. Lee Yat Kai for three years, which sublease has been duly registered by the land office. After the defendant had won in the Federal Court, it wrote to the plaintiffs asking when it could resume mining the land, but the plaintiffs replied saying that the matter had not been concluded as they were applying for leave to appeal to the Yang di-Pertuan Agong, which leave has in fact been granted to them on 24th April, 1970.

Because of Mr. Lee Yat Kai's appearance as sublessee on the register, the defendant company's application is in two parts. First, it asks for an order to delete